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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-

R. C. WRIGHT, Warden, Et al.,

Petitioner,

vs.

JERRY L. JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on April 2, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 509 F.2d 828 (5th Cir. 1975) and is set out in Appendix A hereto, pp. 1a-11a, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 2, 1975. A

timely motion for rehearing was filed, and was denied by that Court on April 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN RULING THAT THE STATE OF GEORGIA IS REQUIRED TO PROVE, AS AN ESSENTIAL ELEMENT OF THE OFFENSE OF CARRYING A WEAPON WITHOUT A LICENSE, **GEORGIA CODE ANN.** SEC. 26-2903, THAT THE ACCUSED DID NOT POSSESS A LICENSE, WHERE THE GEORGIA SUPREME COURT HAS RULED THAT THE POSSESSION OF A LICENSE IS AN AFFIRMATIVE DEFENSE TO SAID OFFENSE, TO BE RAISED BY THE DEFENDANT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the United States Constitution.

2. This case also involves the following provisions of the Code of Georgia:

a. Georgia Code Ann. Sec. 26-2903 Carrying Pistol without License.

A person commits a misdemeanor when he has or carries on or about his person outside of his home, automobile or place of business any pistol or revolver, whether concealed or not, for which he has not obtained a license from the ordinary of the county in which he resides.

b. **Georgia Code Ann.** Sec. 26-2904
License to Carry Pistol or Revolver.

The ordinary of each county may on application under oath and payment of a license fee of three dollars issue a license, either in term or during vacation, to any resident of the county authorizing the applicant, for a period of three years from the granting of such license, to have and carry a pistol or revolver in an open manner and fully exposed to view or in his motor vehicle provided the applicant: (a) is twenty-one years or older; (b) is mentally competent; (c) has not within the 10 years immediately preceding the application been convicted of a felony or within the two years immediately preceding the application been convicted of a forcible misdemeanor; and (d) gives a bond, with a surety approved by the ordinary of said county, payable to the Governor in the sum of $300 conditioned upon the lawful use of the pistol or revolver.

The ordinary granting the license shall keep a record of the name of the person taking out the license, the name of the maker of the firearm to be carried, and the caliber and number of the firearm. The ordinary shall not grant a license to any applicant who does not comply with the above requirements and furnish the required information. The ordinary of the county where the license was issued shall, after notice and hearing, revoke the license upon adjudication of mental incompetency, upon the conviction of a felony, a forcible misdemeanor, or a violation of section 26-2901 or section 26-2902.

STATEMENT OF THE CASE

On January 7, 1972, at about 2:30 p.m., Officer D. F.

Lindstrom of the Atlanta Police Department, heard a call over the police radio which, in essence, stated there was a suspicious person at a grocery store on Lee Street, in southwest Atlanta. (Hearing Transcript, p. 3; Trial Transcript, p. 17). Officer Lindstrom answered that call, which was at Patterson's Grocery Store. There, Officer Lindstrom talked to two or three employees, who stated that a tall, black male in his early twenties, wearing a flop-hat had entered the store. They indicated that they believed this man had been involved in the robbery of the store two days previously. The employees informed him that the subject had left the scene in a red Ford Fairlane which was jacked up in the rear with a license tag wired on to the car. It was believed that the car was occupied by four black males, one or two of whom had flop-hats on. Officer Lindstrom passed this information over the police radio and set about to search for the suspect. (Hearing Transcript, pp. 4, 17; Trial Transcript, pp. 17, 18, 19, 27).

Officer R. R. Wilbanks heard the call over the radio. He joined the search of the immediate area. Officer Lindstrom was driving down Ashby Street when he spotted a car fitting the description of the subject vehicle going in the opposite direction. He turned around and followed it. (Hearing Transcript, p. 4; Trial Transcript, p. 20). The two cars passed Officer Wilbanks, who was proceeding in the opposite direction. He turned and followed. After they crossed the railroad tracks, at the intersection of Murphy Street and Lillian Street, Officer Wilbanks turned on his blue light, honked, and pulled the car over. Officer Lindstrom, who was in a police station wagon, pulled in front of the subject vehicle. (Hearing Transcript, pp. 5, 6, 18, 19; Trial Transcript, pp. 21, 27).

The suspects, including Respondent, were transported to the police station. They were advised of their rights, and asked to sign waiver forms, acknowledging the reading of their rights, and waiving the presence of counsel at a line-up. Respondent signed both forms. The next day, January 8, 1972, at about 2:30, Respondent appeared in a line-up, at which time he was identified by Mr. Willie Verdon, operator of Willybern's Food Store in Atlanta, which was robbed on December 10, 1971. (Hearing Transcript, pp. 22, 33, 34, 42, 43; Trail Transcript, pp. 35, 36, 37).

Respondent was subsequently indicted by the Grand Jury of Fulton County and charged with the offenses of armed robbery, carrying a concealed weapon, and carrying a pistol without a license. To said charges, Respondent pleaded not guilty, and, on July 24, 1972, was placed on trial in the Superior Court of Fulton County, Georgia, before the Honorable Jack Etheridge and a jury.

During the trial, after the evidence and arguments had been presented, the judge sought to instruct the jury on the law. His charge, in pertinent part, was as follows:

> Now, this defendant has been charged, as I said in one indictment, with the possession of a pistol without a license, and with the carrying of a pistol outside of his home, not in an open manner. I instruct you that the State has proven a prima facie case of the possession of a pistol in this case by someone who is alleged by the Grand Jurors here to have been the defendant, which the defendant denies. And when a prima facie case is made, I charge you that it is then upon the defendant, if you believe the defendant to be the person alleged to have committed this crime, to show that he did

> possess a license to carry the weapon alleged to have been carried by the State. The defendant in doing so must prove that a license existed to carry the weapon in order to overcome the prima facie showing of the violation of this law by the State. (Trial Transcript, p. 171).

The jury returned a verdict of guilty, and the defendant was sentenced to a term of ten (10) years in the penitentiary for the offense of armed robbery, and twelve (12) months each for the two pistol offenses, to run concurrent to the armed robbery sentence. Respondent then proceeded by direct appeal to the Supreme Court of Georgia, which, on February 22, 1973, affirmed the conviction. *Johnson* v. *State*, 230 Ga. 196 (1973). *See*, Appendix C.

Respondent on April 4, 1973, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court for the Northern District of Georgia, Atlanta Division. This petition was dismissed on April 27, 1973, because Respondent had failed to exhaust all State remedies. Upon motion for leave to appeal *in forma pauperis*, the District Judge reconsidered his original order, and determined that since Respondent had raised all issues alleged in his petition on his appeal to the Georgia Supreme Court, and that since the Georgia Supreme Court had reached and decided each of those issues, the exhaustion requirement had been met.

That order was entered by Judge Edenfield on May 23, 1973. Prior to the entry of that order, and pursuant to the order of the District Court dated April 27, 1973, Respondent filed a petition for habeas corpus in the Superior Court of Fulton County on May 11, 1973. In this petition, Respondent raised the same issues alleged

in his petition to the District Court. On May 25, 1973, after entry of the order of May 23 by the District Judge, Respondent's petition was dismissed in Fulton Superior Court.

On August 20, 1973, the District Judge entered an order denying Respondent's petition. The order was eventually appealed to the United States Court of Appeals for the Fifth Circuit, which, on April 2, 1975, entered an order affirming in part and reversing in part, the order of the District Court. A motion for rehearing was timely filed, and denied on April 28, 1975.

In his petition to the District Court below, and in his appeal to the Supreme Court of Georgia, respondent contended that the charge, quoted above, placed an impermissible burden upon him to prove that he had a license to carry the pistol outside his home, office or automobile. In each instance, the Court disagreed with him. *See*, Appendices B and C. The Court of Appeals reversed. *See*, Appendix A.

The petitioner before this Court was the Respondent-Appellee below. It is respectfully urged that this Court review that portion of the decision of the Court of Appeals which revised the order of the District Court.

BASIS FOR FEDERAL JURISDICTION BELOW

The jurisdiction of the United States District Court for the Northern District of Georgia, Atlanta Division, was invoked by the respondent, and accepted by the Court, pursuant to 28 U.S.C. Sec. 2254 (1970). *See*, Appendix B.

REASON WHY THE WRIT SHOULD BE GRANTED

This Court should issue the Writ of Certiorari to the

Court of Appeals below because that Court, in its decision in this case, resolved an important issue of Georgia law in a way contrary to prevailing Georgia law as enunciated by the Supreme Court of Georgia.

A.

In 1910, the General Assembly of Georgia acted to regulate the possession and use of handguns in Georgia. In that year, Georgia's first handgun licensing statute was enacted. Georgia Laws 1910, pp. 134, 135. That statute was amended in 1960 and superseded in 1969. The present statute is set out above. *Georgia Code Ann.* Sec. 26-2904. For sixty-five years, it has been illegal in Georgia to possess a handgun outside of the home or office.

The license required to authorize such possession of a handgun is issued by the ordinary (now probate judge) of the county to any resident of that county meeting the following qualifications: a) he is twenty-one years of age; b) he is mentally competent; c) he has not been convicted of a felony within the ten years immediately preceding the application; and d) he has not been convicted of a forcible misdemeanor within the two years immediately preceding the application. Any resident meeting these qualifications, who makes application to the ordinary and gives a bond conditioned upon the proper use of the handgun, will be issued a license.

That license authorizes the named person, and no one else, for a period of three years, to carry the handgun specified in the license by make, caliber and serial number, "in an open manner and fully exposed to view or in his motor vehicle," when outside the confines of his home or office. *Georgia Code Ann.* Sec. 26-2904.

This case involves the enforcement arm of this licensing provision, which is codified as *Georgia Code Ann.* Sec. 26-2903. In Georgia, it is prima facie illegal to possess or carry a handgun outside of the home, office or automobile. *Ezzard* v. *State*, 229 Ga. 465 (3) (1972). But, as an accomodation to the people who have a need, real or perceived, to carry a weapon, this prima facie illegality may be justified by proof of the acquisition of a license. Since the Second Amendment is inapplicable to individuals, no person has an absolute right to bear arms. *United States* v. *Cruikshank*, 92 U.S. (2 Otto) 542 (1875). Therefore, the action of the General Assembly of Georgia in establishing this statutory scheme was constitutionally permissible, based upon the legislative determination that the safety and protection of all Georgians required such action.

The enforcement statute, enacted to enforce the mandate of the licensing statute, is a criminal statute carrying misdemeanor punishment. In a prosecution under that statute, and under the predecessor statute, the Appellate Courts of Georgia have consistantly required that the State prove that the accused carried a handgun on or about his person in a place not his home, office, or automobile. This holding has been based upon the construction of the statute, finding that those are the essential elements of the offense stated in *Georgia Code Ann.* Sec. 26-2903. With equal consistency the Georgia Courts, in these same cases, have held that the possession of a license, duly-issued, is an affirmative defense, to be raised by the defendant, and considered by the jury with the other evidence, and not to be negated in advance by the State. *Ezzard* v. *State, supra. See, Reed* v. *State*, 195 Ga. 842, 850, 851 (5) (1943); *McHenry* v. *State*, 58 Ga. App. 410 (1) (1938); *Fanning* v. *State*, 39

Ga. App. 531 (1929); *Webb* v. *State*, 18 Ga. App. 44 (1) (1916); *Elkins* v. *State*, 17 Ga. App. 479 (1915); *Brown* v. *State*, 15 Ga. App. 484 (1914). This construction and interpretation of the Georgia statutory scheme by the highest court in the State of Georgia is binding on the federal courts. *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970); *Kingsby International Pictures Corp.* v. *Regents of University of State of New York*, 360 U.S. 684, 688 (1959).

The essential elements of the offense of carrying a pistol without a license are the possession of a pistol or revolver outside of the home, office, or automobile. Whether or not an accused has a license authorizing him to carry the handgun under circumstances is a matter of defense, and is not an essential element of the offense.

This construction has been placed on this criminal statute for obvious reasons. In all criminal cases, the law requires that the prosecution prove, beyond a reasonable doubt, all of the essential elements of the offense charged. But where there is some fact with regard to such an offense, the proof of which involves the proof of a negative, and where the knowledge of that fact is peculiarly within the knowledge of the defendant; and where going forward with the evidence on that issue would not subject him to undue hardship or unfairness, it is logical to require the defendant to go forward with the evidence. This is the rationale behind the construction placed on the statute by the Georgia Supreme Court. *See, Wallace* v. *State*, 224 Ga. 255 (3) (1968). This rationale has been extended in Georgia to drug sale cases. The Georgia Supreme Court has held that the State does not have to prove that the defendant did not have authority to sell heroin. *Wood* v. *State*, 233 Ga. 347 (1974).

The logic of this approach is irrefutable. If the prosecution were required to prove that the accused did not have a license, given the licensing statute discussed above, the best effort that the State could make would be to produce evidence from every county in Georgia (totaling 159), that there was not on the records of the Court of Ordinary (now probate court) any record of a license issued to the accused authorizing him to carry a handgun. Petitioner seriously questions whether or not such evidence would be sufficient to prove, beyond a reasonable doubt, that no license had been issued to the accused.

The approach adopted in Georgia is not unconstitutional. Because the possession of a license is denominated by the Georgia Supreme Court as an affirmative defense, the defendant need only present evidence thereon, unless the State's case raises the issue. *Georgia Code Ann.* Sec. 26-401(a). It is not suggested that, within this statutory scheme, the defendant is required to prove that he had a valid license. No burden is cast on him more than to simply go forward with the evidence regarding the license. Such a burden does not violate his right against self-incrimination. *Barnes* v. *United States*, 412 U.S. 837 (1973). While he could take the stand, such would not be absolutely necessary. He could raise the issue by coming forward with a certified copy of the license, or by testimony of other witnesses.

If the defendant were to go forward with evidence on this affirmative defense, then the State could come forward with evidence in rebuttal. The only burden that was shifted by the rulings of the Georgia appellate courts, and by the statute, and by the instruction given in this case, was the burden of going forward with the

evidence. Overall, the burden of proof rested upon the prosecution from the time issue was joined until the time verdict was returned.

B.

The decision of the Court of Appeals below, in disregard of the construction of the statute by the highest court in Georgia held

> that the trial court's instruction violated Appellant's right to due process in permitting the jury to infer that his pistol was unlicensed from the evidence that he possessed one, and also in shifting to him the burden of proof on an essential element of the offense. 509 F.2d at 830.

This holding actually breaks down into two separate legal conclusions. First, the Court determined that in a prosecution under *Georgia Code Ann.* Sec. 26-2903, the State was allowed to prove that the defendant possessed a handgun outside of his home, office or automobile, and that from that evidence the jury was allowed to infer that the handgun was unlicensed. Second, the Court determined that the instruction shifted to the defendant the burden of proof on an essential element of the offense, contrary to this Court's holding in the case of *In re Winship*, 397 U.S. 358 (1970), and that of the Court of Appeals in *Smith* v. *Smith*, 454 F.2d 572 (5th Cir. 1971).

This analysis of the statute, and of its application in the present case, is entirely erroneous. In its analysis below, the Petitioner will attempt to demonstrate the magnitude and the impact of that error.

C.

In ruling that the charge, which followed the statute

as construed and which was held to be proper under state law, shifted to the defendant the burden of proof on an essential element of the offense charged, the Court of Appeals disregarded entirely the construction of the statute by the Georgia Supreme Court.

Respondent raised this same issue in the Georgia Supreme Court. That Court found, upon a construction of the statute, that there was no merit in the contention. The Court quoted the holding in the case of *Ezzard* v. *State, supra.*

> " 'There is no merit in the Appellant's contention that he was required to carry the burden of proof on the two misdemeanor charges. The State had the burden to show, and did show, that the Appellant carried a pistol on his person, outside his home, not "in an open manner and fully exposed to view." . . . The Appellant in defense had the privilege of showing that he had a license to carry the pistol. . .,' "

Johnson v. *State,* 230 Ga. 196 at 200, 201 (4b) (1973).

The construction of this statute by the Georgia Appellate Court is clear. The *corpus delicti* of the offense is to carry a pistol outside of the home, office or automobile, even if in an open manner. The possession of a valid license is an affirmative defense to be raised by the defendant. The District Court believed itself to be bound by this analysis. *Johnson* v. *Wright,* Civil Action No. 18116 (N.D. Ga., August 20, 1973). *See,* Appendix B.

As so construed, the Georgia statutory scheme, and this charge, do not violate the rule of *In re Winship, supra.* In that case, this Court held that due process protects the accused in a criminal prosecution against conviction except upon proof beyond a reasonable

doubt of every fact necessary to constitute the crime with which he is charged. Here, as construed by the Georgia Supreme Court, the crime is proven by evidence which shows the accused possessed a pistol outside of his home, office or automobile. The State proved those facts beyond a reasonable doubt in this case. The State carried its burden under *Winship*. The fact that the State did not prove, and was not required to prove, that the accused did not have a license, does not result in a violation of due process, under *Winship*. Possession of a valid license is an affirmative defense to be raised by the defendant, not an element of the off case, to be proven by the State.

Such a division of the burden of going forward with the evidence does not violate the rule of *Smith* v. *Smith, supra*. That case involved a charge on the defense of alibi which stated: " 'alibi as a defense *must* be established' to the satisfaction of the jury." The Court of Appeals there held that the error lay in the fact that the language of the charge, by using the imperative "must" shifted the burden to the defendant.

> No such burden can be sustained under our Constitution. Evidence of alibi should come into a case like any other evidence and must be submitted to the jury for consideration of whether the evidence as a whole on the issue of presence proves the defendant's guilt beyond a reasonable doubt. 454 F.2d at 578.

The problem in the *Smith* case was simply that the defendant had raised the defense of alibi, and the trial court had charged that the defendant had the burden of sustaining that defense. The Court of Appeals believed that the evidence of alibi should be submitted to the jury like any other evidence, to be considered for what-

ever it was worth, with all the other evidence. The jury then, upon a consideration of all of the evidence, would determine whether the defendant was present and committed the offense, or whether he was absent.

This is exactly what the statutory scheme in question here contemplates. The possession of a valid license is an affirmative defense. *Ezzard* v. *State, supra.* An affirmative defense, like entrapment, coercion, self-defense, justification, etc., is to be raised by the defendant, but it need not be proved, and no burden is cast upon the defendant to do more than go forward with the evidence. *Georgia Code Ann.* Sec. 26-401(a). Such a burden does not violate the defendant's right against self-incrimination. *Barnes* v. *United States, supra.*

Such a statutory scheme, with a like division of the burden of going forward with the evidence, has been adopted by the federal courts in several cases. In *Casey* v. *United States,* 276 U.S. 413 (1928), this Court had occasion to deal with a statutory presumption in narcotics cases. That statute, which has since been recodified, appeared at 26 U.S.C. Sec. 4704(a). That presumption arose if the Government proved that the accused possessed opium or a derivative thereof not in the original stamped package. If such was proven, it was presumed, absent an explanation from the accused, that the drug was purchased illegally.

This Court, speaking through Mr. Justice Holmes, stated

> The statute here talks of prima facie evidence, but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. . . . It is consistent with all the constitutional protections of accused men to throw on them the bur-

> den of proving facts peculiarly within their knowledge and hidden from discovery by the Government. . . . In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by a breach of the law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law.

276 U.S. at 418.

This Court subsequently held that this presumption merely places on the accused, at a certain point, the burden of going forward with the evidence. *Roviaro* v. *United States*, 353 U.S. 53, 63 (1957).

Assuming that the *Casey* case, as construed in *Roviaro*, is still sound law, as is suggested in *Turner* v. *United States*, 396 U.S. 398, 403, 404, 405 (1969), the ruling by the Georgia Supreme Court in the present case was absolutely correct, and that of the Court of Appeals was absolutely erroneous. The presumption dealt with in those cases was of guilt from unexplained possession. This Court allowed to stand a rebuttable statutory presumption upon which the Government could rely as a substitute for proof of an essential element of the offense charged. In the present case, the Georgia Supreme Court required that the prosecution prove *all* of the essential elements of the offense. Then the defendant was permitted to come forward with his defense. The only burden shifted to him was the burden of going forward with the evidence.

This Court, in *Casey*, recognized the difficulty which the prosecution might have in proving facts peculiarly within the knowledge of the accused and hidden from the Government. A similar situation arises in the case

sub judice, as Petitioner has attempted to point out above. Additionally, it should be noted that Georgia has no discovery procedure in criminal cases. *Henderson* v. *State*, 227 Ga. 68 (1970).

Finally, in *Casey*, this Court pointed out that the drug could only be possessed legally by authority of a prescription, or illegally; and, that if the drug was possessed by authority of a prescription, that prescription could be proven with ease. In Georgia, a pistol may be possessed outside the home, office or automobile legally, by authority of a properly issued license. Under any other circumstances, the possession of a pistol in such a situation is unlawful. However, in some situations, such illegality is excused. *See*, *Pickett* v. *State*, 123 Ga. App. 1 (1) (1970).

Just as a prescription to possess drugs may be, with ease, shown by the accused, so may a license be introduced. Just as emergency is a defense to the charge under *Georgia Code Ann.* Sec. 26-2903, so too a valid license is a defense. There is no constitutional impediment to shifting to the accused the burden of going forward with the evidence on the issue of emergency if that be his defense. How then can there be any constitutional impediment where the defense is not emergency, but the possession of a valid license. The Petitioner can see absolutely none.

Furthermore, the Petitioner respectfully suggests that in numerous other prosecutions, the efficient and effective enforcement of the criminal laws would be effectively thwarted if the ruling of the Court of Appeals is allowed to stand. It is important to note that many federal drug prosecutions are controlled during trial by the rules set out in 21 U.S.C. Sec. 885. Prosecutions in

the area of tax evasion and of federal firearms violations would also be affected.

Many state prosecutions would also be affected by this decision, if allowed to stand. In most jurisdictions, a defense to a charge of illicit possession of drugs is the possession of a doctor's prescription. What havoc would be wrought in the enforcement of the drug laws if the prosecution was required in each case to negate the issuance of a prescription? For the prosecution to prove that the accused did not have a valid prescription would be as easy as proving that no angels can sit on the head of a pin, or that no fat man can pass through the eye of a needle. The practical effect of the decision of the Court of Appeals is to legalize the possession of any drug which may be legally possessed with a prescription. In Georgia, that decision makes legal the licenseless possession of any pistol, anywhere, because, in its present form, *Georgia Code Ann.* Sec. 26-2903 is unenforceable.

It would be relatively easy for Georgia to resolve the particular dilemma created in this case. The General Assembly could simply adopt a rule similar to that adopted by the federal government. In a federal prosecution for possessing an unlicensed firearm, the prosecution must negate a valid registration. *U.S.* v. *Collier*, 381 F.2d 616 (6th Cir. 1967). This is due to the fact that lack of registration is an essential element of the offense under the National Firearms Act, 26 U.S.C. Sec. 5841, 5851, 5862. However, such proof is relatively easy for the Government since all such registrations are maintained in a central location by the Department of the Treasury. The State of Georgia could easily set up such a centrally-located agency for maintaining such records. Or, in the alternative, the individual could be

required to carry the license on his person when he carries the pistol. However, in the case of prescription drugs, how could the state prove that an accused did not have a prescription? How could the state change the law to make such proof possible if it were required? The only way would be to make all possession illegal, irrespective of a prescription. Such would be inhumane. The other alternative would be to make all possession legal. Such an alternative would be equally inhumane.

The impact of the decision of the Court of Appeals far exceeds the boundaries of this case. That decision, if allowed to stand, could have a profound effect on the course of law enforcement for years to come. For that reason, Petitioner files this request for certiorari. Petitioner, but for the overall impact of their opinion, would have no qualms about the order of the Court below. But that opinion, in practical effect, and carried to its logical extension, makes unenforceable numerous criminal statutes, both state and federal. For that reason, this Court should grant the Writ of Certiorari to the Court of Appeals for the Fifth Circuit, and reverse the decision below.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the petition for Writ of Certiorari be granted; that the Writ be issued; and this cause inquired into.

Respectfully submitted,

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APPENDIX

APPENDIX A

Jerry L. JOHNSON, Petitioner-Appellant,

v.

R. C. WRIGHT, Warden, et al., Respondents-Appellees.

No. 74-3017.

United States Court of Appeals, Fifth Circuit.

March 13, 1975.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before DYER, MORGAN and GEE, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Appellant was convicted in Superior Court of Fulton County, Georgia, of armed robbery and of carrying a concealed and unlicensed pistol. He appeals the district court's denial of his petition for habeas corpus on two grounds:

(1) his warrantless arrest was not based on probable cause and violated his rights under the Fourth Amendment;

(2) the trial judge's charge to the jury on the weapons count violated his right to due process. For reasons explained below, we hold that his second contention is correct, and we therefore reverse the judgment of the district court.

I.

The challenged arrest of appellant occurred in the

following manner. In the early afternoon of January 7, 1972, Officer D. F. Lindstrom of the Atlanta Police Department received a call on his radio stating that there was a suspicious man at a grocery store in the neighborhood which Lindstrom was currently patrolling. Upon arriving at the store, Lindstrom interviewed several employees, who told him that they believed the man in question had participated in a robbery of the store two days earlier. They described him as a tall black male in his early twenties and wearing a floppy hat; they told Lindstrom that he had left the grocery in a red Ford Fairlane, with a jacked up rear end and with its license plate wired on. They indicated to him their belief that three other black males, one or two of whom were wearing hats, were also riding in the car; appellant was one of these passengers. Lindstrom passed this information along over the police radio, and began to patrol the neighborhood. Shortly, he and R. R. Wilbanks, another officer, both observed a car fitting the employees' description precisely and occupied by four black males. Wilbanks directed the driver of the Ford to pull over, and approached the car to ask for his driver's license. Upon observing a .22 caliber pistol on the front seat, Wilbanks ordered the men out of the car and immediately frisked them. By this time, two additional police vehicles had arrived at the scene, and Wilbanks placed each suspect in one of the cars. He next searched the car and found a sawed-off shotgun; the suspects were then taken to the police station, where they were held on the robbery and gun possession charges.

[1] Our analysis of this series of events begins with the proposition that although "searches conducted without the prior issuance of a warrant are, for the most part,

per se unreasonable, Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), there are a few clearly delineated exceptions to the warrant requirement of the Fourth Amendment." United States v. Anderson, 500 F.2d 1311, 1315 (5th Cir. 1974). In addition, we do not deal here with an indivisible process but with five conceptually distinct stages of the search and arrest, each one of which must satisfy constitutional standards.

[2] First, there can be no question that the officers were justified in stopping the car. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), United States v. Rollerson, 491 F.2d 1209 (5th Cir. 1974). The car precisely fitted the description given by a store employee who alleged that its driver had been involved in a robbery two days previously.

Second, the officers clearly acted properly in arresting the driver when they ascertained that he fit the description given by the store employee. Indeed, appellant does not challenge this contention, and we repeat it only for purposes of logical coherence.

[3] Third, having reason to believe at least one of the car's occupants might have committed armed robbery, and seeing a pistol on the front seat of the vehicle, the officer acted reasonably in ordering the occupants out to be frisked for other weapons. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), United States v. Rosenberg, 458 F.2d 1183 (5th Cir. 1972).

[4, 5] Fourth, having arrested the driver, the police acted properly in searching the car itself for evidence pertaining to the crime. This warrantless search was proper because the officers had probable cause to believe they would find evidence pertaining to the crime, Dyke

v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968), and because they were dealing with a temporarily stopped automobile, a search of which is justified on the basis of exigent circumstances, *see* Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). Naturally, they could not safely and effectively search the vehicle unless it was empty of all passengers, and they therefore acted reasonably in detaining the passengers outside the car. Nor did they act improperly in segregating the passengers in separate cars for the duration of the search; the police had good reason to suspect that these men might be dangerous and might have been involved in a criminal offense. In segregating them, the police reduced any chance that the passengers would confer with each other as to alibis, or that they might endanger the officers.

[6] Finally, when Wilbanks discovered a sawed-off shotgun in the car, he acted properly in arresting all the occupants, since possession of such a weapon constitutes both a federal and a state offense.

Probable cause existed to arrest appellant, and his Fourth Amendment rights were not violated.

II.

At appellant's trial, the judge charged the jury in part:

> Now, this defendant has been charged . . . with the possession of a pistol without a license, and with the carrying of a pistol outside of his home, not in an open manner. I instruct you that the State has proven a prima facie case of the possession of a pistol in this case by someone who is alleged by the Grand Jurors here to have been the defendant, which the defendant denies. And when a prima facie case is made, I charge

you that *it is then upon the defendant,* if you believe the defendant to be the person alleged to have committed this crime, *to show that he did possess a license to carry the weapon alleged to have been carried by the State. The defendant is doing so must prove that a license existed to carry the weapon in order to overcome the prima facie showing of the violation of this law by the State.* (Emphasis supplied.)

[7] On appeal, the Georgia Supreme Court found this to be a proper charge on violations of Ga.Code Ann. § 26-2903[1] and to contain no constitutional errors. Johnson v. State, 230 Ga. 196, 196 S.E.2d 385 (1973). We hold that the trial court's instruction violated appellant's right to due process in permitting the jury to infer that his pistol was unlicensed from evidence that he possessed one, and also in shifting to him the burden of proof on an essential element of the offense.

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) established that the due process clause of the Fourteenth Amendment requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime. . . ." However, the Supreme Court has never decided whether this principle applies to the area of evidentiary presumptions and inferences. For example, in Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), the Court struck down a statutory presumption that possession of marijuana, unless satisfactorily explained, was sufficient to prove that the defendant knew that the marijuana had

1. The statute provides:

> A person commits a misdemeanor when he has or carries on or about his person outside of his home, automobile or place of business any pistol or revolver, whether concealed or not, for which he has not obtained a license from the ordinary of the county in which he resides.

been illegally imported. Concluding that any given marijuana might have been grown domestically, and that a user was unlikely to be aware of its origin, the Court stated that an inference is,

> "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. 395 U.S. at 36, 89 S.Ct. at 1548.

The Court added in a footnote that since the challenged inference did not satisfy the "more likely than not" standard, it "need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." *Id.* n. 64. Likewise, in Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), the Court left the issue unresolved in dealing with the constitutionality of a jury instruction that it might infer from possession of heroin and cocaine that the defendant knew the drugs to have been illegally imported. The Court simply held the heroin inference valid and the cocaine inference invalid, whether judged by the more likely than not standard or the beyond a reasonable doubt standard (*i. e.* the evidence necessary to invoke the inference is sufficient to permit a rational juror to find the inference beyond a reasonable doubt.) Finally, in Barnes v. United States, 412 U.S. 837, 843, 93 S.Ct. 2357, 2361, 37 L.Ed.2d 330 (1973), the Court ruled that, "if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard . . . as well as the more-likely-than-not standard, then it clearly accords with due process."

The inference here involved, that from proof of the defendant's possession of a pistol the jury may conclude that the pistol is unregistered, is clearly violative of due process by either standard. A more arbitrary and unreasonable conclusion can scarcely be imagined, since it is not even more likely than not that a given pistol will be unregistered.

[8] Additionally, the charge is unconstitutional because it shifts the burden of proof of an essential element of the crime to the defendant. Of course, the state always bears the burden of proof in a criminal trial, and any such shift renders the trial fundamentally unfair. Smith v. Smith, 454 F.2d 572 (5th Cir. 1971).

This does not mean, of course, that permissible inferences which satisfy the more likely than not and the reasonable doubt standards violate due process. For example, in Dyer Act[2] cases, the jury may infer from unexplained possession of a recently stolen auto that the defendant knew it to be stolen. There are two crucial distinctions between such an inference and the one involved here.

First, at issue under the Dyer Act is knowing possession of stolen property; "[k]nowledge and intent, because of their nature, must largely be proved by circumstantial evidence." Jackson v. United States, 330 F.2d 679, 681 (8th Cir. 1964). Therefore, once the government has proved that the defendant possessed the prohibited object, the jury may infer that he possessed it knowingly. Under the Georgia scheme, however, the state is not even required to prove possession of the prohibited object, an unlicensed pistol. Rather, the state is merely required to prove that the defendant

2. 18 U.S.C. § 2312.

possessed any pistol. The inference relates not to the defendant's knowledge, but to the nature of the object possessed.

Second, the inference employed in Dyer Act cases is permissible; the jury may make the inference, but it is not required to do so. The burden of proof does not shift to the defendant; he may be acquitted without offering any evidence at all if the jury feels the government has not proved his guilt beyond a reasonable doubt. As we have noted, the Georgia inference goes further and impermissibly shifts the burden of proof to the defendant.

The judgment of the district court is reversed, and it is ordered to issue the writ, subject to the state's privilege to retry appellant.

Reversed and remanded.

* * *

Jerry L. JOHNSON, Petitioner-Appellant,

v.

R. C. WRIGHT, Warden, et al.,

Respondents-Appellees.

No. 74-3017.

United States Court of Appeals,

Fifth Circuit.

April 2, 1975.

Appeal from the United States District Court for the Northern District of Georgia.

Before DYER, MORGAN and GEE, Circuit Judges.

PER CURIAM:

It is ordered that the last two paragraphs of the opinion in this case, dated March 13, 1975, which read as follows:

> The judgment of the district court is reversed, and it is ordered to issue the writ, subject to the state's privilege to retry appellant.
>
> Reversed and remanded.

be stricken, and that the following two paragraphs be substituted in lieu thereof:

> It is no longer a bar to federal habeas relief that granting the writ will not result in petitioner's immediate release. Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968); Walker v. Wainwright, 390 U.S. 335, 88 S.Ct. 962, 19 L.Ed.2d 1215 (1968); Glazier v. Hackel, 440 F.2d 592 (9th Cir. 1971); Velasquez v. Rhay, 408 F.2d 9 (9th Cir. 1969); United States ex rel. Rybarik v. Maroney, 406 F.2d 1055 (3rd Cir. 1969); Rhodus v. Patterson, 404 F.2d 890 (10th Cir. 1968).

The judgment of the district court is therefore affirmed in part and reversed in part. The cause is remanded with instructions to issue the writ as to appellant's gun possession conviction.

It is further ordered that the mandate to be sent to the district court in this case be based on the revised version of the opinion rather than the opinion as originally submitted.

* * *

United States Court of Appeals

FIFTH CIRCUIT

April 28, 1975

TO ALL COUNSEL OF RECORD

Re: 74-3017—Jerry L. Johnson vs. R. C. Wright, Etc., Et Al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ BARBARA KREI
Deputy Clerk

cc: Mr. Philip S. Davi
Messrs. Joel M. Feldman
Lewis R. Slaton
Morris H. Rosenberg
Carter Goode
James H. Mobley, Jr.
Mr. Arthur K. Bolton
Mr. H. Allen Moye

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JERRY L. JOHNSON VS R. C. WRIGHT, WARDEN	CIVIL ACTION NUMBER 18116

JUDGMENT

The Court, Honorable NEWELL EDENFIELD United States District Judge, by order of this date having DENIED THE PETITION FOR WRIT OF HABEAS CORPUS,

JUDGMENT is hereby entered in favor of the respondent and against the petitioner.

Dated at Atlanta, Georgia, this AUGUST 20, 1973.

BEN H. CARTER, CLERK

BY: /s/ KAY BATES

Deputy Clerk

Filed and entered in
AUGUST 20, 1973
Clerk's Office this

BEN H. CARTER, CLERK

By: /s/ KAY BATES

Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JERRY L. JOHNSON	CIVIL ACTION
vs.	
R. C. WRIGHT, Warden, Fulton County Correction and Rehabilitation Center, Alpharetta, Georgia	NO. 18116

ORDER

Petitioner, a state prisoner incarcerated in the Fulton County (Georgia) Correction and Rehabilitation Center, was convicted in the Fulton County Superior Court of armed robbery and carrying an unlicensed and concealed weapon. The convictions were appealed to the Supreme Court of Georgia and affirmed by that court on February 22, 1973. Petitioner then filed an application in this court for the writ of habeas corpus after being permitted to proceed in forma pauperis. The application of petitioner was denied by this court because of his failure to seek habeas corpus in the state superior court under Ga. Code Ann. § 50-107 (Supp. 1972).

Pursuant to an order of this court dated May 23, 1973, the petitioner's case was reopened on his motion for leave to appeal the court's earlier denial. As pointed out by the petitioner in his motion, the exhaustion requirement of 28 U.S.C. § 2254 (1970) had been satisfied since in the petitioner's appeal to the Supreme Court of Georgia, the issues presented in the present case had been raised, considered and decided adversely to the

petitioner. Accordingly, the petitioner's motion for leave to appeal was denied, his case reopened, and the state ordered to show cause why the requested relief should not be granted. The state has now responded.

In his application the petitioner asserts that his arrest by state officials was unlawful, that he was subjected to an illegal lineup, the evidence of which should have been suppressed, and that the instructions given by the state trial judge to the jury which convicted him shifted the burden of proof from the state to the accused and thereby relieved the state of proving guilt beyond a reasonable doubt. The petitioner states that his conviction was obtained only in violation of his rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and he requests an evidentiary hearing by this court to inquire into his claims. A hearing need only be held, however, if the factual determinations reached by the state are not supported by the record as a whole or where material facts were not adequately developed in the state court hearing. The court is satisfied that the proceedings in this case provide adequate support for each of the factual determinations reached by the state courts.

The Arrest

The petitioner claims that his arrest was unlawful because the arresting officer had not obtained a warrant. The petitioner asserts that the sole basis for his arrest was his presence in a suspicious car. The petitioner's claim is without merit.

The arrest was made after an officer responded to a call made by employees of a grocery store which had been robbed two days earlier. The employees informed

the officer that a man, described as a young black in his early twenties, approximately six feet tall, with a small Afro hairstyle and wearing a "flophat", had just left the store. The employees claimed that this man had been involved in the robbery. The employees described in detail the car the man entered after leaving the store. The other occupants of the car were described as three young blacks in their twenties. Since the officer had had personal knowledge of the robbery even prior to having answered the call, he posted a "lookout" for the car over his patrol car radio. Shortly thereafter another police officer, acting on the "lookout", stopped a car fitting the description. Upon asking the driver of the car for his driver's license, the officer observed a pistol lying on the front seat and the barrel of a shotgun protruding from under the driver's seat. The officer testified that he immediately backed away and ordered the four occupants to get out of the car. The petitioner had been in the back seat. The four men were taken into custody along with the weapons. The petitioner claims that the lack of a warrant and the failure of the police officer who posted the "lookout" to corroborate information given by an informant renders the arrest unlawful.

An arrest is lawful when the arresting officer has probable cause to suspect that a crime has been committed and that the person sought committed the crime. Here the officer who posted the "lookout" had personal knowledge that two days prior to the petitioner's arrest a robbery had occurred in the grocery store. On the day of the arrest the officer posted his "lookout" on the basis of information supplied by victims of the crime. This situation is clearly distinguishable from the case of an informant from the criminal milieu who merely

has knowledge of criminal activity. There is no need to establish the credibility of a victim. *Brown v. United States*, 365 F.2d 976, 979 (1966). However, it is necessary to show why the person giving the information has a basis for his knowledge. Here the fact that the informant was a victim of the crime which he claimed was committed by petitioner two days before was sufficient basis for the officer to post the lookout and make lawful a subsequent arrest.

The probable cause required for an arrest and that necessary to conduct a search are substantially different. Here, prior to making the arrest, the arresting officer had no basis on the information contained in the lookout to conduct a search of the car. *However, both the shotgun and the pistol were in plain view.* This is the testimony of the arresting officer who was the subject of cross-examination conducted by the petitioner's counsel in both the trial court and in a hearing on a motion to suppress. For this court to hold that the weapons were not subject to seizure would require a finding that the weapons were not in plain view and there is nothing in the record transcript of the state proceedings which could require such a result.

Illegal Lineup

The petitioner next contends that as a result of his arrest he became the subject of an illegal lineup and that the evidence therefrom should have been suppressed. In reviewing this claim the Supreme Court of Georgia ruled that since the petitioner had withdrawn his motion to suppress lineup testimony during the Superior Court's hearing on the motion, any objection to evidence obtained pursuant to the lineup was ex-

pressly waived. Furthermore, the court held that since it viewed the petitioner's arrest as lawful, the lineup evidence was not the fruit of an illegal arrest.

The Supreme Court of the United States and the Fifth Circuit Court of Appeals have recently held that waiver or abandonment of a constitutional guarantee is disfavored and will not generally be found absent the informed and intelligent choice of the accused. *Humphrey v. Cady*, 405 U.S. 504 (1972), and *Winters v. Cook*, 466 F.2d 1393 (5th Cir. 1972). Here there is nothing in the record transcript which would indicate that counsel obtained petitioner's informed consent prior to abandoning the motion to suppress. Thus there is no support for a finding that petitioner waived his right to contest the identification evidence obtained from the lineup. However, petitioner asserts only that the lineup was unlawful because his arrest was unlawful. Since this court has already stated that the arrest was lawful, it would follow that the lineup conducted pursuant to that arrest must also be held to have been lawful. The petitioner makes no allegation that the lineup was conducted unfairly, nor did he make such an allegation in the state courts. Accordingly, the relief sought on the basis of this ground must be denied.

Jury Instruction

The petitioner attacks the following instruction to the jury by the state trial judge:

> "I instruct you that the state has proven a prima facia [*sic*] case of the possession of a pistol in this case by someone. And when a prima facia [*sic*] case is made, I charge you that it is then upon the defendant, if you believe the defendant to be the person alleged to have committed this crime,

> to show that he did possess a license to carry the weapon alleged to have been carried by the State. The defendant in doing so must prove that a license existed to carry the weapon in order to overcome the prima facia [*sic*] showing of the violation of this law by the State."

The petitioner asserts that the instruction violated the Fifth and Fourteenth Amendments to the Constitution by shifting the burden of proof from the state to the petitioner and thereby relieving the state of proving the guilt of petitioner beyond a reasonable doubt. The petitioner further complains that the instruction denied him of a presumption of innocence and amounted to an expression of the trial court's opinion that petitioner's alibi offense was insufficient as a matter of law.

In support of its holding the Georgia Supreme Court cited its recent decision in *Ezzard v. Georgia*, 229 Ga. 465, _____ S.E.2d _____ (1972). There the Court said, "There is no merit in the appellant's contention that he was required to carry the burden of proof on the two misdemeanor charges. The State had the burden to show, and did show, that the appellant carried a pistol on his person, outside his home, not 'in an open manner and fully exposed to view.' Code Ann. § 26-2901 (Ga.L. 1968, pp. 1249, 1323). The appellant *in defense* had the privilege of showing that he had a license to carry the pistol. [Citations omitted.]" *Id.* at 465, 466.

The language cited from the *Ezzard* case and the jury instruction challenged in these proceedings are consistent with such federal decisions as *Williams v. United States*, 328 F.2d 256 (8th Cir. 1964);[1] *Jackson v.*

[1] The *Jackson* and *Williams* decisions are two of a long line of federal cases involving 21 U.S.C.A. § 174 which create a presumption of guilt where a defendant is shown to have or have

United States, 330 F.2d 679, 681-682 (8th Cir. 1964). The instruction merely pointed out to the jurors that the prosecution's evidence had established a prima facie case and that the defendant could rebut such evidence by showing that he had a license to carry the weapon. Indeed, the challenged instruction proceeded to point out to the jurors:

> "As I have instructed you and as you have observed here, the defendant contends, however, that he was not present and thus could not have been the person allegedly in the unlawful possession of a pistol and possessing a pistol not in an open manner." (Tr. 171.)

Thus the damage, if any, to the defendant's alibi defense in this instruction appears negligible. Moreover, when the text of the jury instructions is read as a whole

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had possession of narcotics. According to the statute, this presumption may be explained away by the defendant. The Supreme Court, as early as 1925, held that the presumption so created was constitutionally sound. Yu Hem v. United States, 268 U.S. 178, 182 (1925). *See* Turner v. United States, 396 U.S. 398 (1970).

it does not appear that the defendant suffered any prejudice.[2]

For the foregoing reasons, petitioner's application for the writ of habeas corpus is DENIED.

IT IS SO ORDERED.

This 20 day of August, 1973.

/s/ NEWELL EDENFIELD

NEWELL EDENFIELD
United States District Judge

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[2] With regard to the petitioner's alibi defense, the trial court instructed the jurors in the following manner:

"Now in this case the defendant has entered a defense which is called alibi. An alibi is a defense involving the possibility, or that is to say, the impossibility of the defendant's presence at the scene; that is, it is his position that he was not at the scene of the offense at the time of its alleged commission.

"I charge you that any evidence whatsoever of alibi is to be considered on the general case with the rest of the testimony and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be resolved in favor of the innocence of the accused." (Tr. 169.)

APPENDIX C

IN THE SUPREME COURT OF GEORGIA

Decided: FEB. 22, 1973

27671. JOHNSON v. THE STATE.

1. The trial court did not err in overruling the motion to suppress evidence on the grounds of illegal arrest, search and seizure.

2. The shotgun involved in the robbery was properly admitted into evidence.

3. The denial of the motion for mistrial was not erroneous.

4. Overruling of the motion to dismiss the misdemeanor pistol charges and the charge to the jury on this subject were proper.

5. The trial court correctly refused to give the charge on guilt or innocence requested by the appellant.

6. The enumeration based on the failure to charge on the unreliability of eyewitness identifications is without merit.

GRICE, Presiding Justice. Jerry Lee Johnson was indicted and tried for the offenses of armed robbery and carrying a concealed and unregistered pistol in the Superior Court of Fulton County. He appeals from the judgments of conviction and sentences of ten years for the armed robbery and one year each on the pistol charges.

1. The appellant contends that the trial court erred in overruling his motion to suppress evidence because evidence used against him was obtained when he was illegally arrested, searched and held in custody without a warrant, probable cause or lawful justification.

The transcript of record reveals that when an Atlanta police officer answered a call at a grocery store he was told by employees there that a black male in his twenties had just left the store in a red Fairlane automobile, jacked up in the rear with its license tag wired on and dangling, occupied by three black males about the same age, one of whom wore a "flop hat". The employees told the officer they believed the man had been involved in a robbery of the store two days earlier and also that they recognized the car as having been used in this holdup.

The officer testified that he knew personally that the store had been robbed, so acting on this information he placed a "look-out" over the police radio for the described car. Relying on this "look-out", another police officer stopped a car fitting the description. The appellant was in the back seat. All four men were taken into custody along with a loaded pistol, which was lying on the front seat between the two occupants, and a loaded shotgun with a sawed off butt and barrel, which was protruding from under the front seat.

The appellant urges that this constituted an unlawful arrest because the officer had not obtained a warrant and the corroboration requirements for information obtained from a confidential informant had not been met; that certain lineup evidence should be suppressed because the arrest was illegal; and that the search of the car during which the weapons were found was likewise illegal.

There is no merit in these contentions.

(a) The crucial question is whether the knowledge of the related facts and circumstances gave the police officers here probable cause and reasonable grounds to believe that the appellant had committed an offense. If it did, the arrest, even without a warrant, was legal;

the subsequent search of the car and seizure of the loaded weapons were validly made incident to a lawful arrest; and the motion to suppress was properly overruled.

It is the function of the court to determine if the facts upon which the officer acted would warrant a man of reasonable caution to believe that an offense had been committed. See in this connection Draper v. United States, 358 U.S. 307, 310, 79 SC 329, 3 LE2d 327; Beck v. Ohio, 379 U.S. 78, 91, 85 SC 223, 13 LE2d 142; *Peters v. State*, 114 Ga. App. 595 (152 SE2d 647).

The source of the information here was not a confidential informant, whose reliability needed to be substantiated, but rather the victims of the robbery themselves. However, the fact that an automobile and its occupants exactly matching the detailed description given the officer was spotted within the immediate area shortly thereafter itself serves as corroboration of the information given. Moreover, the reasonable cause necessary to support an arrest does not demand the same strictness of proof as proof of guilt upon the trial. *Strauss v. Stynchcombe*, 224 Ga. 859, 865 (165 SE2d 302).

In our view, the information upon which the officers acted here was sufficient to sustain the arrest of the appellant without a warrant.

(b) Since we have ruled that the appellant's arrest was legal his contention that there was an illegal search of the car in which he was riding cannot be sustained. Moreover, since the weapons were in plain sight no illegal search was involved here.

(c) The appellant's objection to the trial court's

failure to suppress certain lineup evidence is likewise invalid.

The transcript of the hearing on the motion to suppress discloses that appellant's counsel withdrew his motion to suppress the identification testimony after the court ruled that the appellant had knowingly and intelligently signed a waiver of lineup. Therefore, any objection to this evidence has been expressly waived, and since the appellant's arrest was lawful the lineup evidence is not the fruit of an illegal arrest as contended.

2. The appellant next urges that the trial court erred in admitting the shotgun into evidence because it was not connected to him, was prejudicial, and had been illegally seized.

This argument cannot be sustained.

The owner of the store robbed testified that the appellant was carrying a pistol and another one of the robbers had a shotgun, which he described; and that the shotgun produced in court "looks like the exact gun I saw the day of the robbery and at Police Headquarters." This was the shotgun found in the car with the appellant and his companions when they were apprehended.

"Under all the evidence and circumstances it was for the jury to determine the fact as to whether or not the weapons introduced in evidence were the same weapons used by the accused and his accomplices in perpetrating the robberies for which he was on trial. [Citations]" *Clements v. State,* 226 Ga. 66 (172 SE2d 600).

The shotgun was properly admitted into evidence and was not prejudicial to the appellant, as contended. For the reasons stated in Dvision 1 (b) above, the search of the car and seizure of the shotgun were not illegal.

3. Because of the rulings made in Division 1 and 2 above, the appellant's enumerations of error concerning admission into evidence of a lineup photograph and the denial of his motion for mistrial based upon the admission into evidence of the shotgun and the lineup photograph cannot be sustained.

4. The appellant's enumerations that the trial court erred in overruling his motion to dismiss the misdemeanor pistol charges, and that the charge to the jury on the subject was improper, are not meritorious.

(a) The conviction for carrying a concealed weapon was clearly supported by the evidence.

The owner of the robbed store testified that while he was talking on the telephone he saw the appellant and another man outside the store; that while he was still talking on the telephone one of them hit him "in the bend of the leg with something" and he fell down; that when he looked up he saw the appellant with a pistol; and that the appellant then told him to "Get off the phone" and give him the money in the cash register and his billfold, and said "Don't move", and the robbers left the store.

The only logical inference to be drawn by the jury from this evidence was that the pistol was concealed by the appellant on his person until the time that the actual perpetration of the robbery began.

(b) The appellant's contentions that an impermissible burden was placed upon him to prove that he had a license to carry the pistol, and that the trial court erred in charging the jury that he had to rebut the burden of proof in regard to the pistol charge, have been decided adversely to him in the recent decision of *Ezzard v. State*, 229 Ga. 465 (3) (SE2d).

This court there said: "There is no merit in the appellant's contention that he was required to carry the burden of proof on the two misdemeanor charges. The State had the burden to show, and did show, that the appellant carried a pistol on his person, outside his home, not 'in an open manner and fully exposed to view.' Code Ann. § 26-2901 (Ga. L. 1968, pp. 1249, 1323). The appellant *in defense* had the privilege of showing that he had a license to carry the pistol. [Citations]."

What we said there is equally applicable to the evidence and charge to the jury given by the court in the instant case.

5. The appellant protests the trial court's refusal to give a requested charge to the jury from *Patrick v. State*, 75 Ga. App. 687 (2) (44 SE2d 297), to wit: "Where the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence. *Davis v. State*, 13 Ga. App. 142 (1) (78 SE 866)."

Although this written request to charge was not included in the record, the substance of the charge appears in the transcript in colloquy between the trial judge and counsel for the appellant.

It should be noted that the *Patrick* case, and others following it, involve circumstantial evidence where the State must prove facts that not only are consistent with the hypothesis of the guilt of the accused, but exclude every other reasonable hypothesis. See, e.g., *Carr v. State*, 119 Ga. App. 540, 544 (167 SE 707), and cases cited.

Here however, the appellant was identified by victims of the robbery both at a lineup and in court. The only theory consistent with his innocence was the defense of alibi and this was completely and adequately charged, as requested, by the trial court. The court also fully charged on reasonable doubt. Therefore, the denial of the requested charge does not constitute reversible error.

6. The appellant's final enumeration, that the trial court erred in failing to charge his written request containing language from Wade v. United States, 388 U.S. 218, SE , LE2d , concerning the unreliability of eyewitness identifications, is not maintainable.

The requested charge is not included in the record and the colloquy contained in the transcript does not reflect the substance of it, as contended by the appellant. All that appears is the trial judge's response to counsel's objection to its denial, that "Your request No. 5 was denied and that had to do in general with the testimony of a witness in which you cited United States versus Wade."

Counsel for appellant made no effort to perfect the record as provided in Code Ann. § 6-805 (f) (Ga. L. 1965, pp. 18, 24), and nowhere in his brief or argument has he stated what language he contends the court should have charged the jury. Since the trial judge fully charged the jury in regard to determining the credibility of witnesses and on reasonable doubt, this enumeration is without merit. *Geter v. State*, 226 Ga. 236 (6) (173 SE2d 680) (One Justice dissenting on other grounds).

Judgment affirmed. All the Justices concur.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-

R. C. WRIGHT, Warden, Et al.,
Petitioner,

vs.

JERRY L. JOHNSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, Lewis R. Slaton, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Petition for Writ of Certiorari in the above-styled case on Counsel for the Respondent by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Phillip S. Davi, Esq.
P. O. Box 8182
Atlanta, Georgia 30306

All parties required to be served have been served this 3rd day of July, 1975.

Lewis R. Slaton

Fulton County Courthouse
Third Floor
Atlanta, Georgia 30303

LEWIS R. SLATON
District Attorney,
Atlanta Judicial Circuit